Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Inovalon, Inc.'s Petition for Expedited Declaratory Ruling	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

COMMENTS OF INOVALON, INC.

Inovalon, Inc. ("Inovalon") by its counsel, submits these comments in support of its Petition for Expedited Declaratory Ruling Clarifying the Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act (hereinafter, the "Petition"). The purpose of this Comment is to update the record to reflect developments that have occurred since the Petition was filed last month and to explain why these developments underscore the need for the Commission to promptly issue the Declaratory Ruling Inovalon has requested.

I. Status of Pending Litigation Against Inovalon

Inovalon filed the Petition on February 19, 2018, the same date on which it filed its motion to dismiss the lawsuit brought by Eric B. Fromer Chiropractic, Inc. ("Fromer") in the U.S. District Court for the District of Maryland, No. 8:17-cv-03801-GJH.[1] Fromer opposed Inovalon's motion to dismiss on March 5, a week and a half after the Commission called for comments on the Petition. Plaintiff's opposition to Inovalon's motion to dismiss relied heavily upon the Fourth Circuit's February 23, 2018 decision entered in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018), which Fromer reads as holding that "***all*** faxes offering free goods and services" are per se "advertisements" for purposes of the fax provisions of the Telephone

[1] A copy of Inovalon's motion to dismiss is attached hereto as Exhibit "A."

Consumer Protection Act ("TCPA"). *Id.*, at 467 (emphasis added). Defendant-appellee in that case filed a petition for rehearing *en banc* on March 9, 2018. Inovalon and Fromer have stipulated to defer further briefing on the motion to dismiss until the Fourth Circuit denies the petition for *en banc* rehearing or publishes an *en banc* opinion.

II. The Fourth Circuit's *Carlton* Opinion Underscores Why FCC Clarification is Needed

In *Carlton*, over a vigorous dissent, the Fourth Circuit held that the Junk Fax Prevention Act ("JFPA") unambiguously provides that any or all faxes offering goods or services at no charge to the fax recipient are "advertisements," and that the FCC's rules simply confirm this conclusion. *Carlton*, 883 F.3d at 466-67. It purports to deny federal district courts the power to interpret FCC orders in any way but the most expansive sense, lest a narrower or more nuanced reading be construed as "invalidating" the order in violation of the Hobbs Act. *Id.*, at 469-70 (Thacker, J. dissenting) (arguing that a district court's determination that a statute is unambiguous and, therefore, reference to an agency's interpretation of that statute is unnecessary for purposes of *Chevron* deference, does not amount to an "invalidation" of that interpretation in violation of the Hobbs Act). In its opposition to Inovalon's motion to dismiss, Fromer ignores the dissent and essentially argues that there is nothing for the FCC to decide, rendering the Petition moot.

There are several problems with this line of reasoning. First, neither the statute nor the FCC implementing rule are as unambiguous as the *Carlton* majority and Fromer seem to think. The Rule itself defines advertising as promoting the "commercial" availability of goods or services (47 C.F.R. § 64.1200(f)(1)); and the fact that a message is "commercial" does not inevitably mean that the message is covered by the TCPA, of which the JFPA is a part. *Cf.* 47 C.F.R. § 64.1200(a)(3)(iii). In a sense, the Commission has recognized this by its calls for comment in response to several petitions for declaratory ruling, including Inovalon's. Certainly,

as Inovalon noted in its Petition, there is a sharp division within the Circuits as to the manner in which the term "advertisement" is to be defined. *See* Petition at 8-11. As a result, the proposition advanced by Fromer that there is nothing for the FCC to decide and no purpose to a declaratory ruling is simply without foundation. Indeed, it is imperative to the orderly and uniform administration of the TCPA that the Commission clarify exactly what it considers to be an "advertisement" within the meaning of the JFPA.

III. Faxes With No Direct Commercial Purpose, Which Offer No Commercially Available Goods or Services Are Not "Advertisements"

Clarification of an open textured term like that at issue here can be made only within the specific context of the communication – who is the sender, what purpose is sought to be served, and who is the intended recipient? On these matters, as Inovalon has made clear in its Petition, there is no ambiguity: the only purpose of these faxes is to enable the recipients to easily and at no cost carry out their contractual duties to the health plans for whom Inovalon acts as an agent.

Inovalon is in the business of collecting electronic health records from health care providers (*e.g.*, doctors' offices) on behalf of health care plans (*e.g.*, insurers). Providers contractually agree to provide medical records to the plans, and the plans, in turn, delegate that collection function to Inovalon. Fromer's suit was instigated by a single fax Inovalon sent advising of the methods by which Fromer (a provider) could meet its obligation to provide medical records to a plan with which it contracted. Inovalon offered nothing for sale or lease to Fromer, but merely informed the business that it could fulfill its contractual obligation at no cost to itself by using Inovalon's product. That Inovalon is a for-profit business and that the use of the product would assist Inovalon in performing its functions as the health plans' agent are immaterial. Inovalon did not and could not have offered anything for sale or lease to Fromer because it simply does not currently offer commercial products or services to the recipients of its faxes – health care providers. Nevertheless,

because it offered Fromer a no cost way to comply with its contractual obligation to provide medical records, Fromer insists it *ipso facto* was sent an unsolicited advertisement via fax in violation of the TCPA.

It is difficult to understand how the purpose of these faxes could be misconstrued: the reality in 2018 is that faxes in general are used exclusively by businesses communicating with other businesses ("B2B"), not to consumers. Unlike the privacy concerns implicated by calling consumers at their homes and on their mobile phones, to which the more stringent sections of the TCPA are directed, businesses hold themselves out to the public and frequently post their phone and fax numbers so that they may be contacted. Indeed, as Inovalon identified in its Petition, that is particularly true with respect to Fromer's lawsuit, where, during a recorded September 7, 2017 telephone conversation between Inovalon and Fromer, Fromer voluntarily provided its fax number to Inovalon as a "good fax number for [its] location." Petition, at 5.

And Fromer, like the other recipients of Inovalon faxes are not naïve: they are professionals who have entered into arrangements with the health plans for whom Inovalon acts as agent because it serves their interest to do so; they surely understand that they will receive communications from or on behalf of health plans' vendors. What's more, Inovolan's use of facsimile inherently frees up other communication resources that the health care providers use to communicate with ordinary consumers (*i.e.*, their patients): telephone and text message.

Accordingly, the issue of when a communication should be considered an "unsolicited advertisement" depends significantly not just on the formal terms used in the statute but also on the setting and context in which the messaging occurs – the primary audience for faxes is businesses, not ordinary consumers, and businesses are the exclusive audience for the faxes that are the subject of Inovalon's Petition. The JFPA itself recognizes that the interpretation of the

definitions within the TCPA depends upon the intended recipient, and that the privacy concerns of residential subscribers are materially different than those of a business. An unsolicited advertisement with an opt-out notice lawfully may be faxed to anyone with whom the sender has an established business relationship, or to any recipient who has made his or her fax number publicly available. 47 U.S.C. § 227(b)(1)(C). Even if they are deemed "unsolicited" (which Inovalon disputes), the faxes at issue in its case are fundamentally lawful and the underlying business relationship makes any consideration of an opt-out provision unenforceable. *See Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 55-59 (2d Cir. 2017) (holding that the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent under contract law principles); *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1081-83 (D.C. Cir. 2017) (holding that solicited facsimile advertisements do not need to contain opt-out notices). Unlike the TCPA provisions governing the use of autodialers, the fax provisions do not require prior consent. By requiring consent for calls but not for faxes, Congress implicitly recognized that concerns over privacy and intrusion are not the same for these very different communications methods.

In sum, in considering whether the Inovalon communications are "advertisements" (which Inovalon contends they are not) or whether they are "unsolicited" (which Inovalon also contends they are not), the context of these faxes cannot be ignored. As a matter of fundamental policy, these faxes do not offend the JFPA simply because there is no direct commercial purpose and no offer of goods or services to the fax recipient.

IV. Faxes Are Common in the Healthcare Field and Should be Protected

Faxes are heavily used in the healthcare field, and protecting that usage is in the public interest. The Commission can consider public interest values in assessing the breadth of definition

of terms that are ambiguous, *see ACA International v. FCC*, -- F.3d --, 2018 WL 1352922, at *19 (Mar. 16, 2018), and indeed, both this Commission and the Federal Trade Commission have recognized that there are special considerations to be taken into account in the healthcare field. While there may be reasons to narrowly define the TCPA's "healthcare exception" in the context of cell phone calls, that sort of restriction should not apply to faxes where prior express consent is not required and where, if not explicit then implicit and irrevocable consent exists because of the contractual relationship between the healthcare provider and the health plan for which Inovalon acts as an agent. Faxes like the one underpinning the current litigation against Inovalon plainly fall within the penumbra of healthcare-related activity that needs to be permitted and carried out without risk of class action litigation. For that reason, the Commission must make clear that the JFPA is simply inapplicable to faxes of the type that Inovalon and other service agents use in the healthcare field in order to enable the healthcare system to function efficiently and economically.

March 26, 2018

Respectfully Submitted,

INOVALON, INC.

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